Supreme Court, U.S.
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No. 96-113

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., RONALD REIMER, KENNETH H. KOGER, CLIFFORD W. SHINKSI, BRENT MESSICK, ROBERT CREW, SHERMAN DREISESZUN, LELAND GERHART, I.I. OZAR, RAYMOND GIFFORD, HARRY S. JONAS, RANDALL M. NAY, FRANK SEBREE, TONY SALAZAR, PHILIP PISTILLI, MICHAEL K. RUSSELL, GAGE & TUCKER, PEAT, MARWICK, MITCHELL & CO., KPMG PEAT MARWICK, ROBERT SPENCE, THOMAS S. MORGAN, co-executor of the estate of FRANK S. MORGAN, MARILYN J. MORGAN, co-executor of the estate of FRANK S. MORGAN, ISABEL A. KIENE, executrix of the estate of RALPH E. KIENE, SHOOK, HARDY & BACON, C. PATRICK McLARNEY, substituted for SHOOK HARDY law firm, BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REIMER & KOGER RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KATHLEEN A. HARDEE
Counsel of Record
CAROL Z. SMITH
Gilliland & Hayes, P.C.
3100 Broadway, Suite 1234
Kansas City, MO 64111
(816) 753-3100

GREGORY F. MAHER
JAMES M. YERETSKY
YERETSKY & MAHER
1810 City Center Square
1100 Main
Kansas City, MO 64105
(816) 842-5566

Counsel for Respondents Reimer & Koger Associates, Inc., Kenneth H. Koger, Clifford W. Shinski, Brent Messick, and Robert Crew

Legal America, Ltd.—Kansas City, Missouri—(816) 471-0110

60 pp

QUESTIONS PRESENTED

1. Whether a federal district court, exercising jurisdiction over an action under both 12 U.S.C. § 1441a(l), arising-under original jurisdiction, and 28 U.S.C. § 1367, supplemental jurisdiction, retains jurisdiction over the action despite the dismissal of the Resolution Trust Corporation as a party prior to trial.

2. Whether abstention principles are relevant when a federal district court has exclusive jurisdiction over an action removed under 12 U.S.C. § 1441a(l).

3. Whether a federal district court with jurisdiction over a removed action, may enjoin the filing of identical state court suits after such removal, when the state court suits are filed for the purpose of subverting removal jurisdiction.

4. Whether an actual case or controversy exists when the preliminary injunction appealed from has been superseded by a permanent injunction upon which a separate appeal has been taken.

RULE 29.6 STATEMENT

Respondent Reimer & Koger Associates, Inc. is a Kansas corporation which has no parent or subsidiary company. Respondents Kenneth H. Koger, Clifford W. Shinski, Brent Messick and Robert Crew are individuals.

TABLE OF CONTENTS

Questions Presented i

Rule 29.6 Statement ii

Table of Authorities iv

Opinions and Orders Below 1

Statutory Provisions Involved 2

Counterstatement of the Case 5

A. Procedural History 5

B. Injunctions 6

C. Eighth Circuit Affirmance 9

D. Subsequent Events 10

Reasons for Denying the Petition for Writ 11

1. Jurisdiction is Proper in the Federal Court 11

2. The Doctrines of Federal Abstention and Comity Are Not Relevant To The District Court's Power to Issue The Preliminary Injunctions 13

3. The District Court Had Authority to Issue the Preliminary Injunctions 14

4. KPERS' Issues Are Now Moot 18

Conclusion 19

TABLE OF AUTHORITIES

Cases **Pages**

Billy Jack for Her, Inc. v. New York Coat, Suit, Dress, Rainwear and Allied Workers' Union, 515 F.Supp. 456 (S.D.N.Y. 1981) 17

Brown v. Seaboard Coast Line Railroad Co., 309 F.Supp. 48 (N.D.Ga. 1969). 17, 18

Calesnick v. Redevelopment Auth., 696 F.Supp. 1053 (E.D. Pa. 1988) 17

California v. Keating, 986 F.2d 346 (9th Cir. 1993) 12

Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988) 9

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 14

Condor Corp. v. City of St. Paul, 912 F.2d 215 (8th Cir. 1990) 9

Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899 (5th Cir. 1975) 17

International Ass'n of Entrepreneurs of America v. Angoff, 58 F.3d 1266 (8th Cir. 1995), cert. denied, 116 S.Ct. 774 (1996) 10, 13

Juidice v. Vale, 430 U.S. 327 (1977) 14

Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d 614 (8th Cir. 1993), cert. denied, 114 S.Ct. 2132 (1994) 4, 9, 10, 12, 13

Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 60 F.3d 1304 (8th Cir. 1995) 6

Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 61 F.3d 608 (8th Cir. 1995), cert. denied, 116 S.Ct. 915 (1996) 6, 11

Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 77 F.3d 1063 (8th Cir. 1996), reh'g denied, April 18, 1996 12

Kansas Public Retirement System v. Russell, Shawnee County, Kansas District Court Case No. 95 CV 936 6

Kansas Public Employees Retirement System v. KPMG Peat Marwick, Shawnee County, Kansas District Court Case No. 95 CV 937 6

Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980) 10, 13

Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987) 17

Mannings v. School Bd. of Hillsborough County, 796 F.Supp. 1491 (M.D. Fla. 1992) 17

Muskrat v. United States, 219 U.S. 346 (1911) 19

Myers v. Hertz Penske Truck Leasing, Inc., 572 F.Supp. 500 (N.D.Ga. 1983) 17

Northwest Airlines, Inc. v. American Airlines, Inc., 989 F.2d 1002 (8th Cir. 1993) 16, 18

National City Lines v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982) 10

Reliable Transfer Co. v. Gallahar, 54 F.Supp. 395 (S.D.Ga. 1944) 18

Rose v. Giametti, 721 F.Supp. 924 (S.D. Ohio 1989) 17

Spring Garden Associates, L.P. v. RTC,
26 F.3d 412 (3d Cir. 1994) 12

United Mine Workers v. Gibbs,
383 U.S. 715 (1966) 9

United States Fire Ins. Co. v. Goodyear
Tire & Rubber Co.,
920 F.2d 487 (8th Cir. 1990) 16

United States v. Telephone Co.,
434 U.S. 159 (1977) 17

Webb v. GAF Corp.,
78 F.3d 53 (2d Cir. 1996) (per curiam) 18

In Re Y&A Group Sec. Litigation,
38 F.3d 380 (8th Cir. 1994) 16

Younger v. Harris,
401 U.S. 37 (1971) 10, 13, 14

Statutes, Regulations and Scholarly Materials

12 U.S.C. §1441a(l) 2, 9, 11, 13

28 U.S.C. § 1367 ..... 3, 12

28 U.S.C. § 1446(d) 4, 15, 18

28 U.S.C. § 1651 ..... 4, 15

28 U.S.C. § 2283 ..... 4, 9, 10, 15

Kansas City Business Journal, September 8, 1995 7

OPINIONS AND ORDERS BELOW

The decision of the Court of Appeals being directly appealed is Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 77 F.3d 1063 (8th Cir. 1996), reh'g denied, April 18, 1996. (Petitioner's Appendix ("Pet. App.") pp. 1a-15a) The written order of the district court is unreported. The district court's order and partial transcripts of the district court's decisions are set forth in Pet. App. pp. 16a-35a.

Other decisions implicated by the issues raised by Petitioner are the Eighth Circuit's decision that the district court had original jurisdiction over this entire action, Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d 614 (8th Cir. 1993) cert. denied, 114 S.Ct. 2132 (1994) (Respondent's Appendix ("Resp. App.") pp. 1a - 19a); the district court's order denying KPERS' third motion to remand, an unreported decision (Resp. App. pp. 20a - 27a); and the district court's order that the preliminary injunctions be made permanent, an unreported decision (Resp. App., pp. 28a - 33a).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1441a(l)(1) and 1441a(l)(3)(A) provide in relevant part:

> *(1)* **Power to remove; jurisdiction**
>
> **(1) In general**
>
> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [Resolution Trust Corporation] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.
>
> * * *
>
> **(3) Removal and remand**
>
> **(A) In general**
>
> The [Resolution Trust Corporation], in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the [Resolution Trust Corporation] has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the [Resolution Trust Corporation] as conservator or receiver of such institution . . . .

28 U.S.C. § 1367 provides in relevant part:

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1446 provides in relevant part:

§ 1446. Procedure for removal

(d) Promptly after filing of such notice of removal of a civil action the defendant or defendants shall given written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

The All-Writs Act, 28 U.S.C. § 1651, provides in relevant part:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

COUNTERSTATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Kansas Public Employees Retirement System ("KPERS") filed this suit on June 5, 1991, in the District Court of Shawnee County, Kansas. Following several amendments, KPERS' claims ultimately focused on its investment in Home Savings Association of Kansas City, F.A., a Missouri-based savings and loan institution ("Home Savings"). Respondent Reimer & Koger Associates, Inc., by and through certain employees and representatives ("Reimer & Koger respondents"), was retained by KPERS to manage various high-risk direct placement investments, including the investment in Home Savings. The Reimer & Koger respondents were named as defendants in this suit in their capacity as investment managers for KPERS for that direct placement portfolio.

Contrary to KPERS' Statement of the Case, this suit never consisted of "civil fraud claims . . . pursued by Kansas in its sovereign capacity in lieu of a criminal prosecution." (Petition for Writ, p. 3) The Reimer & Koger respondents have never been sued for fraud. Nor is KPERS pursuing these claims in a "sovereign capacity." Indeed, the courts below have held that KPERS in making investments was acting in its proprietary, not governmental, capacity.

Following the Resolution Trust Corporation's ("RTC") removal of this action to district court, KPERS filed its first of three separate motions to remand. The district court denied that motion and the Eighth Circuit affirmed in October of 1993. Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d

614 (8th Cir. 1993), cert. denied, 114 S.Ct. 2132 (1994). (Resp. App. pp. 1a-19a) On June 30, 1994, the RTC was dismissed from the suit and KPERS argued its second motion to remand. That second motion was denied as well. (Pet. App. p. 3a) KPERS did not request a certification of the district court's decision of June 30, 1994 so as to take an appeal on the issue of jurisdiction. Subsequently, two more interlocutory appeals were taken to the Eighth Circuit without KPERS challenging jurisdiction. (Pet. App. p. 4a)

B. INJUNCTIONS

On July 27, 1995, the Eighth Circuit announced two decisions against KPERS in Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 61 F.3d 608 (8th Cir. 1995), cert. denied, 116 S.Ct. 915 (1996) and Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 60 F.3d 1304 (8th Cir. 1995). In an effort to avoid the possible ramifications of those decisions, KPERS mounted a two pronged assault on the district court's retention of jurisdiction over this case.[1]

On August 23, 1995, KPERS filed two parallel state court suits in Shawnee County, Kansas. In Kansas Public Retirement System v. Russell, et al., Case No. 95 CV 936, KPERS sued the Reimer & Koger respondents, Russell and Shook Hardy asserting identical causes of action and seeking identical damages as alleged in this suit. In Kansas Public Employees Retirement System v. KPMG Peat Marwick, Case No. 95 CV 937, KPERS sued Peat Marwick asserting identical causes of action and seeking

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[1]It is this litigious assault waged by KPERS which has caused the delays of which KPERS complains in its Petition for Writ. (Petition for Writ, p. 6)

the identical damages alleged against Peat Marwick in this suit. (Pet. App. pp. 4a-5a)

The motivations for KPERS' actions were not left to conjecture. On September 8, 1995, KPERS' counsel, Eugene Pavilon, was quoted in the Kansas City Business Journal regarding KPERS' reasons for filing the parallel actions:

> Frankly, the reason we did this is because there are multitude of problems and issues that are causing delays in federal court, coupled with what we think is an erroneous decision by the 8th Circuit in interpreting the Kansas statute of limitations. [Emphasis added.]

(Pet. App. p. 4a)

On September 12, 1995, KPERS filed its third motion to remand this case and its second motion for reconsideration on issues relating to the statute of limitations.

In response to the duplicative parallel state court actions, the district court issued four preliminary injunctions on September 29, 1995. Those preliminary injunctions prohibited KPERS from filing additional suits arising out of the Home Savings investment against the Reimer & Koger respondents, Shook Hardy, Blackwell Sanders and Peat Marwick.[2] KPERS improperly characterizes the purpose of those injunctions as solely

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[2]The Peat Marwick injunction also stayed the parallel state court suit which was still pending in state court. The other parallel state court suits had been removed to federal court prior to consideration of the injunctions.

being to protect the district court's supplemental jurisdiction. In fact, the district court stated that the injunctions would issue for the following reasons:

> Insofar as the future assertion of claims against these defendants are concerned, in cases filed in Kansas in the future, there has been no compelling circumstance presented which would prevent the application of the first-filed rule. * * * Granting injunctive relief furthers the general federal policy against multiplicity of litigation and furthers the policies of most states against multiplicity of litigation; comports with common sense; protects and furthers the ability of this court to as efficiently and as economically as possible resolve the issues raised in this case against these defendants free of the distractions, which the track record of this case demonstrate fully occur when efforts are made to assert the same claims in other courts.

(Pet. App. pp. 27a-28a)

KPERS filed its notice of appeal from these injunctions on October 2, 1995. Rather than arguing its third remand motion in the district court, KPERS attempted to backdoor its remand argument into its appeal from the injunctions.

Despite KPERS' efforts, the district court took up and again denied the third request for remand. (Resp. App. pp. 20a-27a) The court found that it had both original and supplemental jurisdiction of the case and

would continue to exercise that jurisdiction. KPERS has not sought certification of that order so as to take an interlocutory appeal, but rather raises those issues herein.

C. EIGHTH CIRCUIT AFFIRMANCE

The Eighth Circuit considered and rejected each of the three questions presented by KPERS in its Petition for Writ. On the first issue, the Eighth Circuit affirmed the district court's decision that it had both original "arising-under" jurisdiction of the entire case under 12 U.S.C. § 1441a*(1)* and supplemental jurisdiction under 28 U.S.C. § 1367, despite the dismissal of the RTC. With respect to original jurisdiction, the Eighth Circuit was merely reaffirming its previous decision on the same point, a decision for which certiorari was denied by this Court. Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d 614 (8th Cir. 1993), cert. denied, 114 S.Ct. 2132 (1994). (Resp. App. 1a- 19a) Thus, even if the district court improperly exercised supplemental jurisdiction, it was not without jurisdiction over this case.

Despite such a conclusive holding, the Eighth Circuit further ruled that KPERS could not prevail even if the jurisdictional analysis relied solely upon the decision of the district court to exercise supplemental jurisdiction. The Eighth Circuit held that the question of whether to retain a case after dismissing federal claims is discretionary, not jurisdictional (citing United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 349 (1988); Condor Corp. v. City of St. Paul, 912 F.2d 215 (8th Cir. 1990)). (Pet. App. pp. 5a-7a)

With respect to the second issue raised by KPERS

in its Petition for Writ, the Eighth Circuit held that abstention under Younger v. Harris, 401 U.S. 37 (1971) is inapplicable where a federal court has exclusive jurisdiction over a claim (citing International Ass'n of Entrepreneurs of America v. Angoff, 58 F.3d 1266, 1271 (8th Cir. 1995), cert. denied, 116 S.Ct. 774 (1996); Levy v. Lewis, 635 F.2d 960, 967 (2d Cir. 1980)). (Pet. App. pp. 13a-14a) Because the Eighth Circuit had previously held in Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d 614 (8th Cir. 1993), cert. denied, 114 S.Ct. 2132 (1994) that the district court had exclusive jurisdiction over the entire case under 12 U.S.C. § 1441a, it found that Younger abstention was inappropriate.

Finally, with respect to the third issue raised by KPERS in its Petition for Writ, the Eighth Circuit held that the district court's injunction in favor of the Reimer & Koger respondents was not precluded by the Anti-Injunction Act, 28 U.S.C. § 2283, because the parallel state court action had since been removed to federal court. The court found that the Anti-Injunction Act does not apply if there is no state litigation in progress when the federal court issues its injunction (citing National City Lines v. LLC Corp., 687 F.2d 1122, 1127 (8th Cir. 1982)). (Pet. App. p. 8a)

D. SUBSEQUENT EVENTS

Subsequent to the entry of the Eighth Circuit opinion being challenged here, the district court ordered that the preliminary injunctions of which KPERS complains be made permanent. (Resp. App. pp. 28a- 33a). That order is currently the subject of appeal filed by KPERS.

REASONS FOR DENYING THE PETITION FOR WRIT

1. JURISDICTION IS PROPER IN THE FEDERAL COURT

KPERS phrases its first question in a light which is misleading and implies that the district court lacked subject matter jurisdiction over this action. The Eighth Circuit did state that the question of whether a federal court should exercise supplemental jurisdiction to retain a removed action after dismissal of the federal claims is discretionary, not jurisdictional. The court explained that the existence of jurisdiction is determined at the time of removal. (Pet. App. pp. 5a-7a) However, this ruling was purely academic. The district court has both original and supplemental jurisdiction over this case. As explained by the district court in its denial of KPERS' third motion to remand:

> . . . KPERS mistakenly asserts that supplemental jurisdiction is the only basis for this court's jurisdiction over this case. In addition to the proper exercise of supplemental jurisdiction, this court has original jurisdiction over all of the claims asserted in this case. In KPERS v. Reimer & Koger, 61 F.3d 608, 610 (8th Cir. 1995), the court stated with regard to a case removed to federal court by the RTC under the Financial Institutions Reform, Recovery and Enforcement Act: "Under § 1441a(1), any suit to which the RTC is a party is 'deemed to arise under the law of the United States,' and the district courts therefore have original jurisdiction over

> such suits. This grant of jurisdiction includes the entire suit, even though the RTC was only a third-party defendant."
>
> Because § 1441(a)(1) provides federal jurisdiction over all the claims contained in this case, there is no need to inquire into supplemental jurisdiction when the federal claims are dismissed. See Spring Garden Associates, L.P. v. RTC, 26 F.3d 412, 417 (3d Cir. 1994); see also California v. Keating, 986 F.2d 346, 348-49 (9th Cir. 1993) (adding the RTC to a case "transforms the entire action into one that 'arises under' the laws of the United States.). Therefore, original jurisdiction exists over the claims remaining after the RTC was dismissed.
>
> On the other hand, if supplemental jurisdiction is required, I continue to believe that the factors of economy, convenience, fairness and comity weigh unmistakably in favor of exercising supplemental jurisdiction over the state law claims. See 28 U.S.C. § 1367(e).

(Resp. App. pp. 23a-24a)

The original jurisdiction of the district court is an issue twice affirmed by the Eighth Circuit and on which certiorari has already once been denied by this Court. Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d 614 (8th Cir. 1993) cert. denied, 114 S.Ct. 2132 (1994) (Resp. App. pp. 1a - 19a); Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 77 F.3d 1063 (8th Cir. 1996) reh'g denied, April

18, 1996 (Pet. App. 1a-15a) Thus, the subject-matter jurisdiction of the district court over this action is an issue which has been conclusively determined.

2. THE DOCTRINES OF FEDERAL ABSTENTION AND COMITY ARE NOT RELEVANT TO THE DISTRICT COURT'S POWER TO ISSUE THE PRELIMINARY INJUNCTIONS

KPERS' second question pleads for the application of the principles of abstention and comity. As phrased, KPERS again misleads this Court by implying that such principles were required to be considered by the federal court in issuing its injunctions. Again, KPERS' argument ignores the district court's original jurisdiction under 12 U.S.C. § 1441a.

KPERS' argument on this point was summarily dismissed by the Eighth Circuit because abstention under Younger v. Harris, 401 U.S. 37 (1971) is inappropriate where a federal court has exclusive jurisdiction over a case (citing International Ass'n of Entrepreneurs of America v. Angoff, 58 F.3d 1266, 1271 (8th Cir. 1995), cert. denied, 116 S.Ct. 774 (1996); Levy v. Lewis, 635 F.2d 960, 967 (2d Cir. 1980)). (Pet. App. pp. 13a-14a) Because the Eighth Circuit had previously held in Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc., 4 F.3d 614 (8th Cir. 1993), cert. denied, 114 S.Ct. 2132 (1994) that the district court had exclusive jurisdiction over the entire case under 12 U.S.C. § 1441a, it found Younger abstention was inappropriate.

Even if the doctrine of abstention were applicable, it is an extraordinary and narrow exception to the duty of a federal district court to decide the controversy before

it. Colorado River Water Conservation District v. United States, 424 U.S. 800, 812, (1976). Abstention from the exercise of federal jurisdiction is the exception rather than the rule. Id.

KPERS has not presented the court with the exceptional circumstances required to justify abstention. In this case, KPERS seeks money damages under various tort and contract theories. This case does not involve a complex state regulatory scheme. Nor does this case concern a state effort to establish a coherent policy with respect to a matter of substantial public concern. Instead, KPERS simply desires to recover its alleged loss on an investment, which was part of a high-risk, but overall profitable investment program. Such circumstances do not warrant abstention.

The cases cited by KPERS to support its abstention theory are inapplicable. In Younger v. Harris, 401 U.S. 37 (1971) and Juidice v. Vale, 430 U.S. 327 (1977), lawsuits were brought in federal court to enjoin state court activity. In Younger, the injunction interferred with the operation of the state's criminal justice system. In Juidice, the injunction restrained the state's contempt mechanisms. Here, KPERS' opportunity to prosecute its claim has not been interfered with or restrained.

The doctrines of abstention and comity are inapplicable where the federal court has exclusive jurisdiction over the case. Even if such doctrines were applicable, the requirements for abstention have not been met by KPERS.

3. THE DISTRICT COURT HAD AUTHORITY TO ISSUE THE PRELIMINARY INJUNCTIONS

KPERS inaccurately states that the Eighth Circuit upheld "all the injunctions" under the theory that 28 U.S.C. § 1446(d) directs that a state court must "proceed no further" once a case is removed to federal court. (Petition for Writ, p. 16) In fact, Section 1446(d) was only considered in relation to the Peat Marwick injunction, not the injunction granted to the Reimer & Koger respondents.

The Eighth Circuit's analysis began by questioning whether the Anti-Injunction Act, 28 U.S.C. § 2283, precluded the issuance of the injunctions in question. Because the injunctions granted to the Reimer & Koger respondents, Shook Hardy and Blackwell Sanders, were all granted after the parallel state court suits were removed to federal court, the Anti-Injunction Act was found to be inapplicable. (Pet. App., p. 8a)

Only the Peat Marwick injunction arguably fell within the constraints of the Anti-Injunction Act, as the parallel suit against Peat Marwick was still pending in state court. In analyzing whether the district court erred in granting that injunction, the Eighth Circuit looked to 28 U.S.C. § 1446(d) as an exception to the Anti-Injunction Act. (Pet. App., pp. 8a-12a) Section 1446(d) was never considered, and was wholly irrelevant, to the determination of the appropriateness of the injunction granted to the Reimer & Koger respondents.

In initially granting the injunction prohibiting KPERS from filing state court suits against the Reimer & Koger respondents arising out of the Home Savings investment, the district court ruled that the All Writs Act,

28 U.S.C. § 1651(a) granted broad injunctive powers to the federal courts, "and among those powers [was] the power to control parties before [the district] court in the filing of duplicative and disruptive litigation." (Pet. App. p. 26a) Once vested with such authority, the court then turned its attention to the appropriate standard for determining whether to grant the requested injunction.

Referring to Northwest Airlines, Inc. v. American Airlines, Inc., 989 F.2d 1002 (8th Cir. 1993) and United States Fire Ins. Co. v. Goodyear Tire & Rubber Co., 920 F.2d 487 (8th Cir. 1990), the district court relied upon the well-established rule that in cases of concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case and that, in the absence of compelling circumstances, the first-filed rule should apply. The court then went on to find that no such compelling circumstances had been presented by KPERS. In fact the court found compelling circumstances for applying the first-filed rule and granting the injunctions:

> Granting injunctive relief furthers the general federal policy against multiplicity of litigation and furthers the policies of most states against multiplicity of litigation; comports with common sense; protects and furthers the ability of this court to as efficiently and as economically as possible resolve the issues raised in this case against these defendants free of the distractions, which the track record of this case demonstrate fully occur when efforts are made to assert the same claims in other courts.

(Pet. App. pp. 27a-28a)

The All Writs Act grants broad injunctive powers to federal judges. In re Y&A Group Sec. Litigation, 38 F.3d 380, 382 (8th Cir. 1994). The Act grants power to "issue such commands . . . necessary . . . to effectuate and prevent the frustration of orders [the court] has previously issued." United States v. Telephone Co., 434 U.S. 159, 172 (1977). The Act is also designed to prevent harassment or interference with the progress of litigation pending before the court. See, e.g., Rose v. Giametti, 721 F.Supp. 924, 927-28 (S.D. Ohio 1989) ("Act is generally invoked to protect and preserve the jurisdiction of the court against actions which would frustrate or impinge on its administration of pending litigation" or render it meaningless); Mannings v. School Bd. of Hillsborough County, 796 F.Supp. 1491, 1495-96 (M.D. Fla. 1992) ("federal court should not permit state court proceedings to frustrate effective disposition of the case where the proceedings in a federal court have been ongoing for several years"); and Calesnick v. Redevelopment Auth. 696 F.Supp. 1053, 1055 (E.D. Pa. 1988) (Act provides broad power to grant injunctions necessary to prevent harassment of individuals through repeated filings of baseless complaints).

A federal court may issue an injunction to stay parallel proceedings in a state court where the plaintiff has attempted to defeat federal jurisdiction by filing substantively the same suit in state court following removal. Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987); Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899, 901 (5th Cir. 1975); Myers v. Hertz Penske Truck Leasing, Inc., 572 F.Supp. 500, 501 (N.D.Ga. 1983), Brown v. Seaboard Coast Line Railroad Co., 309 F.Supp. 48 (N.D.Ga. 1969); See also, Billy Jack for Her, Inc. v. New York Coat, Suit, Dress, Rainwear and Allied Workers' Union, 515 F.Supp. 456, 460 (S.D.N.Y. 1981). "If it were otherwise, in removed

cases the whole purpose of the removal statute could be frustrated by renewal of the suits in the state court." Brown, 309 F.Supp. at 49 (quoting Reliable Transfer Co. v. Gallahar, 54 F.Supp. 395, 396 (S.D.Ga. 1944).

In this case, the RTC properly removed this suit from Shawnee County, Kansas to the district court. KPERS sought remand, which was denied by the district court. The district court was affirmed by the Eighth Circuit. Following the dismissal of the RTC as a party, KPERS again sought remand. This second request was again denied. The filing of substantially identical proceedings in Shawnee County, Kansas was a blatant attempt by KPERS to evade federal jurisdiction, avoid various district and appellate court decisions, and totally frustrate the purposes of the removal statutes.

The district court has full authority under the All Writs Act to grant injunctive relief where appropriate. Under the first-filed standard articulated in Northwest Airlines, supra, injunctive relief was appropriate against the filing of future cases by KPERS asserting any claims arising out of KPERS' investments in Home Savings Association. The issue raised by KPERS and its arguments relating to 28 U.S.C. § 1446(d) need not be considered with respect to the injunction granted to the Reimer & Koger respondents.

4. KPERS' ISSUES ARE NOW MOOT

On July 22, 1996, the district court ordered that the preliminary injunctions of which KPERS objects be made permanent. (Resp. App. pp. 28a-33a) KPERS has appealed the entry of the permanent injunctions to the Eighth Circuit. Because the preliminary injunctions have been superseded by permanent injunctions, this appeal

has become moot. E.g., Webb v. GAF Corp., 78 F.3d 53, 56 (2d Cir. 1996) (per curiam). Where an appeal becomes moot, no case or controversy exists upon which this Court may act. E.g., Muskrat v. United States, 219 U.S. 346, 355 (1911).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

KATHLEEN A. HARDEE
Counsel of Record
Gilliland & Hayes, P.C.
3100 Broadway, Suite 1234
Kansas City, MO 64111
(816) 753-3100

GREGORY F. MAHER
YERETSKY & MAHER
1810 City Center Square
1100 Main
Kansas City, MO 64105
(816) 842-5566

Counsel for Respondents Reimer & Koger Associates, Inc., Kenneth H. Koger, Clifford H. Shinski, Brent Messick and Robert Crew

TABLE OF APPENDICES

APPENDIX A

Decision of the United States Court of Appeals for the Eighth Circuit, dated September 2, 1993 ..... 1a

APPENDIX B

Order of the United States Supreme Court Denying Petition for Writ of Certiorari 19a

APPENDIX C

Order of the United States District Court for the Western District of Missouri Filed October 25, 1995 ..... 20a

APPENDIX D

Order of the United States District Court for the Western District of Missouri Filed June 22, 1996 ..... 28a

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 93-1794

Kansas Public Employees Retirement System, Plaintiff-Appellant, v. Reimer & Koger Associates, Inc., a Kansas Corporation; Ronald Reimer, an individual; Kenneth H. Koger, an individual; Clifford W. Shinaki, an individual; Brent Messick, an individual; Robert Crew, an individual; Frank Morgan, an individual; Sherman Dreiseszun, an individual; Leland Gerhart, an individual; I.I. Ozar, an individual; Raymond Gifford, an individual; Harry S. Jonas, an individual; Ralph E. Kiene, an individual; Randall M. Nay, an individual; Frank Sebree, an individual; Tony Salazar, an individual; Philip Pistilli, an individual; Michael K. Russell, an individual; Gage & Tucker, a law partnership; Peat, Marwick, Mitchell & Co. , an accountancy firm; KPMG Peat Marwick, an accountancy firm; Robert Spence, an individual; Defendants-Appellees.	*	Appeal from the United States District Court for theWestern District of Missouri.

Frank Morgan; Sherman Dreiseszun; Leland Cerhart; I.I. Ozar; Raymond Gifford; Ralph E. Kiene; Randall M. Nay; Tony Salazar; Philip Pistilli,	*
Third-Party Plaintiff-Appellees,	*
v.	*
Resolution Trust Corporation,	*
Third-Party Defendant-Appellee.	*

Submitted: June 14, 1993
Filed: September 2, 1993

Before MCMILLIAN, JOHN R. GIBSON, and HANSEN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The Kansas Public Employees Retirement System appeals from a district court[1] order denying its motion to remand this action to a Shawnee County, Kansas, district court. KPERS argues that because the state court severed the original claims from the third-party claims before the third-party defendant, the Resolution Trust Corporation, removed the case to federal court, only the third-party claims could be removed. KPERS also argues that the

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[1]The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

district court erred in holding that the third-party plaintiffs' claim for indemnification against the RTC was not frivolous under 12 C.F.R. § 545.121 (1992). We affirm.

On June 5, 1991, KPERS filed suit in the District Court of Shawnee County, Kansas, to recover damages resulting from the purchase of Home Savings Association debentures for the Kansas Employees' Retirement Fund. KPERS named Michael K. Russell (its former board chairman) , Reimer & Koger Associates (its former investment advisor) , Peat, Marwick, & Mitchell Company (its former accounting firm) , Gage & Tucker (its former law firm) , and the Home Savings Association's officers and directors[2] as defendants. Along with various allegations of fraud, breach of fiduciary duty, professional negligence, and gross negligence, KPERS claimed that the Home Savings directors violated the Kansas Securities Act, Kan. Stat. Ann. § 17-1268 (1983) . In response, the Home Savings directors moved to dismiss KPERS' claims as derivative of claims that belonged solely to the RTC, and argued that the RTC was a necessary party.

Shortly thereafter, the RTC moved for leave to intervene in order to remove the action to federal court, where the RTC would attempt to have the case dismissed. On August 21, 1992, the Kansas district court denied the Home Savings directors' motion to dismiss and held that KPERS' claims were nonderivative. The Kansas court never ruled on the RTC's motion requesting leave to intervene.

On October 2, 1992, the Home Savings directors

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[2]Frank Morgan, Sherman Dreiseszun, Leland Gerhart, I.I. Ozar, Raymond Gifford, Ralph E. Kiene, Randall M. Nay, Tony Salazar, and Philip Pistilli.

filed a third-party petition against the RTC, claiming negligent mismanagement of Home Savings, which caused a loss of funds that could have been used to repay part of the KPERS investments, and seeking indemnification under 12 C.F.R. § 545.121. On October 8, 1992, at approximately 4:00 p.m., KPERS' counsel contacted the Shawnee County district court clerk to discuss the filing of a motion to strike the third-party claims or sever them from the original claims. The clerk advised the lawyers that the office would remain open after the normal 5:00 p.m. closing to permit the filing of pleadings. KPERS' counsel also contacted the chambers of the district judge handling the case, stating that KPERS "desired to present [a] severance motion to the . . . court for ex parte consideration that day." Opposing counsel were not notified.

At 5:26 p.m., KPERS' counsel appeared ex parte before the Kansas district judge to present its motion to strike the third-party petition or, alternatively, sever the third-party claims from the original lawsuit. The Kansas district judge stated:

> The Court is familiar with the history of this case, [and] feels that under the circumstances the addition of the Resolution Trust Corporation . . . by the third-party petition would subject this case to removal under the federal statutes .... [T]he Court [does] not feel that . . . to maintain [the third-party claims] in the same case [as the principal claims] and subjecting [the entire] case to removal would be in the best interests of the advancement of the princip[al] case. . . . I . . .sign ex parte the order to sever and

> direct . . . that the third party claim be severed and filed . . . as a separate case entirely from the previous [case]. . . [T]he Court considers this matter on an emergency basis.

The judge also provided that any aggrieved party could file a motion for reconsideration and the court would consider such motions along with KPERS' motion to dismiss the third-party claims.

None of the parties filed a motion for reconsideration. Instead, five days after the Kansas court entered the severance order, the RTC filed a notice of removal for the entire case—both the original and third-party claims. In response, KPERS asked the federal district court to remand the "original case" to the Kansas court because the RTC was no longer a party to that action. The district court held a hearing on KPERS' motion for remand, and asked KPERS' counsel about the motivation behind the severance and whether the defendants' counsel had been called before the ex parte proceeding occurred:

> THE COURT: [T]here was time to call the clerk's office and make this arrangement, but there was not time to call any other lawyer and suggest, "Hey, you might want to get over here because we're going to present this to the judge."
>
> MR. DEACY: That's so, as I understand it, Your Honor.
>
> THE COURT: And there was an emergency.

MR. DEACY: It was an emergency.

THE COURT: What was the emergency?

MR. DEACY: The emergency was that so long as the cases were one case, the RTC could remove it all.

THE COURT: And they could — had that right under federal law to do so.

MR. DEACY: They had the right under federal law so long as they were a party to the case.

THE COURT: Right. And so the emergency was to do something quickly to prevent the RTC from removing the case?

MR. DEACY: That's right, Your Honor.

KPERS' counsel also assured the district court that the Kansas judge severed the case specifically to prevent removal:

THE COURT: And it stated that the reason the judge is doing this is to, in essence, to prevent the RTC from removing the case.

MR. DEACY: No question about it.

. . .

THE COURT: . . . [T]he only reason the judge gave for entering the severance order on an emergency basis was to prevent the RTC from removing the case, which everybody believed the RTC had the right to do at the instant before the judge signed this order.

MR. DEACY: Before the severance, yes, Your Honor. That's right. . .

. . .

THE COURT: . . . KPERS' position, as I understand it, is that but for the order that the judge entered, the case would have been removed by the RTC, KPERS and the judge did not want it removed by the RTC, and so this order was entered, . . . not severing the third party petition or complaint for a separate trial, but severing it into another case.

MR. DEACY: That's true, Your Honor.

Ruling from the bench, the district court emphasized that the Kansas court's only stated reason for severing the action into two separate cases was to defeat the RTC's ability to exercise its right to remove the entire action to federal court. The district court determined that granting severance for the sole purpose of defeating a congressionally conferred right violated the Supremacy Clause, U.S. Const. art. VI, cl. 2. Thus, the court held that the severance order was void and the

entire case could be removed to federal court. In addition, the court stated that it was not bound by state procedural maneuverings in determining whether it had subject matter jurisdiction. The court held that the RTC had the right to remove the entire case, even though it was a third-party defendant, and that a state court could not defeat that right by using a mere procedural maneuver—arbitrarily dividing one case into two separate cases. Finally, the court rejected KPERS' argument that the third-party claims were frivolous and thus not within the district court's subject matter jurisdiction. The court reasoned that because the RTC, as receiver, was a successor of Home Savings, it could be liable for indemnification of the Home Savings directors under 12 C.F.R. § 545.121. The district court then certified the matter for interlocutory appeal.

I.

On appeal, KPERS argues that the district court erred in holding that the severance order was void for violation of the Supremacy Clause. More specifically, KPERS contends that the district court did not have the right to review the Kansas court's severance order in determining whether to remove the original and third-party actions; that the Kansas court's order effectively divided the cases, the RTC was no longer a party to the original action, and thus, the RTC had no congressionally conferred right to remove it; and that the severance order did not frustrate any congressional purpose, and any conflict that might have existed between the severance and the RTC's right to remove was illusory.

Whether a case is removable is a question of federal law to be decided by the federal courts. See Harrison v. St. Louis & San Francisco R.R. Co., 232 U.S. 318, 329 (1914);

see also Terral v. Burke Constr. Co., 257 U.S. 529, 557-58 (1922); Stoll v. Hawkeye Casualty Co., 185 F.2d 96, 99 (8th Cir. 1950). The district court therefore had jurisdiction to decide whether the RTC could remove the original and third-party actions under 12 U.S.C. § 1441a(l).[3] Likewise, we have jurisdiction to determine whether the district court properly decided to allow removal, and we review the district court's decision de novo.

To determine whether the RTC could remove both the original and third-party claims, the district court had to examine the procedural status of the "cases" as of the date the RTC requested removal. See Pullman Co. v. Jenkins, 305 U.S. 534, 540 (1939). In so doing, the district court had to decide whether the Kansas court's severance order created two separate and distinct cases and caused the RTC to be a named party to the third-party action, but a "stranger" to the original action. Thus, the district court did not review the Kansas court's order for "correctness" under Kansas law or in the sense that an appellate court might review a trial court. Instead, the district court examined the order as an integral part of its removal decision relating to both the original and third-party claims.[4] See Harrison, 232 U.S. at 329.

In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act, giving the RTC the right to remove cases to federal court:

[3]The RTC removed the action to the United States District Court for the Western District of Missouri because Home Savings principal place of business was located in Kansas City, Missouri. See 12 U.S.C. § 1441a(l) (3) (A)

[4]Although some of the appellees urge that the Kansas court's actions are void because they did not comply with Kansas law, we decline to discuss this issue as it takes us beyond the review necessary for determining whether removal is appropriate.

> The Corporation, in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the corporation has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the Corporation as conservator or receiver of such institution.

12 U.S.C. § 1441a(l) (3) (A) (Supp. III 1991). When the Home Savings directors brought the RTC into the action as a third-party defendant, the RTC had the right to remove "the entire case" to federal court. California v. Keating, 986 F.2d 346, 348-49 (9th Cir. 1993) (emphasizing that the RTC could remove the entire action at any time); see also In re Surinam Airways Holding Co., 974 F.2d 1255, 1260 (11th Cir. 1992) (holding that a foreign state third-party defendant's removal under 28 U.S.C. § 1441(d) (1988) entitled it to remove the entire case, not just the third-party claims against it); Nolan v. The Boeing Co., 919 F.2d 1058, 1066 (5th Cir. 1990) (concluding that when a foreign state third-party defendant removes under § 1441(d), "it removes not just the third-party claims but the main claims as well") , cert. denied, 111 S. Ct. 1587 (1991)

KPERS agrees with the analysis to this point. In fact, this is admittedly why KPERS went to the Kansas

court to request severance on an "emergency" basis, and why the Kansas court granted the ex parte order. KPERS argues that once the Kansas court divided the case, the RTC was no longer a party to the original action and only had a right to remove the separate, third-party action. The appellees, on the other hand, contend that the Supremacy Clause renders the severance order void.

The Supremacy Clause provides that the Constitution "and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Thus:

> when state law touches upon the area of federal statutes enacted pursuant to constitutional authority, "it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law. This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power."

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 479-80 (1974) (citations omitted) . In addition, "[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse.'" Howlett v. Rose, 496 U.S. 356, 368 (1990). "An excuse that is inconsistent with or violates federal law," however, "is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." Id.

It is also well established that states cannot directly or indirectly prevent, defeat, or limit the free exercise of

the right to remove. Goldey v. Morning News, 156 U.S. 518, 523 (1895) (stating that the state legislature and judiciary can neither defeat the congressionally conferred right to remove a case from state court to federal court, nor limit the effect of such removal); see also Terral, 257 U.S. at 532; Harrison, 232 U.S. at 328. Likewise, the federal courts should not condone a procedure intended to prevent removal when a party has the right to remove. See Wecker v. National Enamelling & Stamping Co., 204 U.S. 176, 185-86 (1907); see also Anderson v. Home Ins. Co., 724 F.2d 82, 83-84 (8th Cir. 1983) (joinder to deprive federal courts of jurisdiction is fraudulent and will not prevent removal).

Congress gave the RTC a broad right to remove any action, and until the Kansas court acted ex parte with the stated purpose of limiting the RTC's right to remove, the RTC could have removed the entire case to federal court. As KPERS' counsel admitted in his discussion with the district court and in his brief before this court, the Kansas court intended to keep the original action in state court by preventing the RTC from exercising its federal right to remove On its face the Kansas court's order violates the Supremacy Clause. We conclude that the district court did not err in holding the severance order void.

Nevertheless, even if we assume the Kansas court effectively severed the action into two cases, that procedural maneuver did not divest the RTC of its interest in the original action. Under both the Kansas and Federal Rules of Civil Procedure, a "third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim." See Kan. Stat. Ann. § 60-214 (1983); Fed. R. Civ. P. 14(a). Because a third-party defendant cannot relitigate the question of a

third-party plaintiff's liability to the original plaintiff, this provision protects the third-party defendant against any prejudice that might result from the third-party plaintiff's failure to assert a particular defense against the original plaintiff. See, e.g., United States v. Lumbermens Mut. Casualty Co., 917 F.2d 654, 658 n.5 (1st Cir. 1990) (allowing a third-party defendant that was not a "party" to the original action to raise on appeal claims of error based in the original action); Glick v. White Motor Co., 458 F.2d 1287, 1291 n.7 (3d Cir. 1972) (permitting the third-party defendant to take part in the trial and to examine and cross-examine witnesses as the rules of evidence permit) ; F & D Property Co. v. Alkire, 385 F.2d 97, 100 (10th Cir. 1967) (stating that "a third party defendant is in the lawsuit as an adverse a party to the same extent as the defendant and must act accordingly"); Williams v. Keyes, 125 F.2d 208, 209 (5th Cir.), cert. denied, 316 U.S. 699 (1942); 6 Charles A. Wright et al., Federal Practice & Procedure § 1457 (2d ed. 1990). The provision also reduces the possibility of collusion between the plaintiff and the third-party plantiff.[5] See Wright, supra.

In Nolan, the Fifth Circuit addressed a similar question regarding the removability of an action involving a foreign state that had been named as a third-party defendant. 919 F.2d at 1061. The state court in Nolan ordered severance of the third-party claims in an ex parte proceeding. Id. The third-party defendant removed "the entire case," the district court refused to remand, and the plaintiffs appealed. Id. The Fifth Circuit determined that 28 U.S.C. § 1441(d) granted a foreign state the right to remove an entire action, not just the claims against it,

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[5]These same reasons answer KPERS' argument that the severance order did not conflict with the congressional objective of giving the RTC the right to remove.

regardless of severance. Id. at 1065. The court found no significant difference between the authorization for removal of an entire action by a sovereign co-defendant, and removal of an entire action by a sovereign third-party defendant. Id. In fact, the court determined that the third-party's interests in removal may be more compelling because its liability is logically dependent on the liability of the defendant in the original action—to fully protect itself the third-party defendant may be called upon to assert defenses on behalf of the defendant. Id.

Thus, once the Home Savings directors brought the RTC into the action as a third-party defendant, the RTC became inextricably involved in the entire action—both the original and third-party claims. Although both the Kansas and Federal Rules of Civil Procedure allow a court to sever the third-party claims from the original claims, such severance does not exclude the third-party defendant from participation in the original action nor deprive it of its ability to exercise its congressionally conferred right to remove the entire case to federal court. See Nolan, 919 F.2d at 1065.

II.

KPERS next argues that the district court erred in holding that the Home Savings directors' indemnification claim against the RTC is not frivolous.

In Bell v. Hood, 327 U.S. 678, 682-83 (1946), the Supreme Court stated:

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a proper cause of action on which [the plaintiff] could actually

> recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. . . . [A] suit may sometimes be dismissed[, however,] for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

(citations omitted); see also Hagans v. Lavine, 415 U.S. 528, 536-37, 542-43 (1974).

As we stated earlier, the Home Savings directors' third-party petition against the RTC contains two counts. First, the directors claim that the RTC negligently mismanaged Home Savings after it took control. The directors also claim that if they are found liable in the original action with KPERS, they are entitled to indemnification from Home Savings under 12 C.F.R. § 545.121, and the RTC assumed this liability as a receiver under 12 U.S.C. § 1821(d) (1988). Thus, even if we were

to strike the second claim as legally frivolous in accordance with KPERS' arguments, the district court would still retain jurisdiction over the entire case as the negligent mismanagement claim would remain.

KPERS relies on our decisions in Condor Corp. v. City of St. Paul, 912 F.2d 215 (8th Cir. 1990), and Adams v. Resolution Trust Corp., 927 F.2d 348 (8th Cir.), cert. denied, 116 L.Ed.2d 41 (1991), as well as the Fifth Circuit's decision in First Indiana Federal Savings Bank v. Federal Deposit Insurance Co., 964 F.2d 503 (5th Cir. 1992), to support its argument that even if the Home Savings defendants could prevail on their indemnification claim against the RTC as successor, there are no Home Savings assets with which the RTC could satisfy the judgment, and therefore, the claim is moot and frivolous.[6] The complaints in Condor, Adams, and First Indiana Savings, however, did not contain an alternative, direct claim against the defendant as this third-party complaint contains. The plaintiffs in Condor, Adams, and First Indiana Savings had only indirect claims against a receiver or successor—claims derived from the original institution's liability to the plaintiffs. Striking the indirect claims in those cases disposed of the entire matter. In contrast, the Home Savings directors have asserted a negligent mismanagement claim directly against the RTC, and as we stated earlier, whether the district court erred by concluding that the indemnification claim was not

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[6]The Home Savings defendants point out that the "frivolousness test" may not apply at all given the RTC's special removal statute, which would allow the RTC access to the federal courts regardless of the nature of the claim. We need not answer this question, however, because we have determined that the court retains jurisdiction over the entire action regardless of whether the indemnification claim is frivolous.

frivolous is not of import regarding removal jurisdiction as the mismanagement claim would survive a decision to strike and the court would retain jurisdiction. Under either count of the third-party claim, the RTC may participate in the original case and assert defenses on behalf of the Home Savings directors, contending that the directors were not liable for the KPERS loss.[7] Thus, we need not consider at length the arguments regarding the indemnification claim.

Section 545.121 requires that a federal savings association indemnify its directors, officers, and employees for liability and costs they may incur as a result of their position. 12 C.F.R. § 545.121. The district court determined that some of the claims against the Home Savings directors could be characterized as negligence or strict liability claims that might entitle the Home Savings directors to indemnification. The court concluded that the RTC, as a receiver of Home Savings, was a successor to Home Savings, 12 U.S.C. § 1821(d) (1988), and therefore, might be liable for indemnification of the directors, officers, or employees under 12 C.F.R. § 545.121. In addition, the RTC concedes that the claims are not frivolous, the Kansas court did not strike the third-party claims as KPERS requested in its motion to strike or alternatively sever the third-party claims, and the parties submitted lengthy briefs with opposing arguments regarding the merits of the claim and the Home Savings directors' ability to collect on a judgment. Under these circumstances, we cannot say the third-party claims are "so patently without merit as to justify . . . the court's

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[7]Whether the assertion of such defenses is strategically wise is not for us to decide. We merely keep the avenues open to permit the RTC to assert whatever defenses it wishes.

dismissal for want of jurisdiction." Bell, 327 U.S. at 683; Hagans, 415 U.S. at 542-43. The RTC may, if it deems appropriate, request dismissal of either or both claims under Fed. R. Civ. P. 12(b) (6) for failure to state a claim, or move for summary judgment. The outcome of these motions,[8] however, would not defeat the district court's jurisdiction as each is considered a ruling on the merits. See Bell, 327 U.S. at 682-83.

Accordingly, we affirm the order of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[8]We express no opinion regarding the merits of the claims or the ability of the claims to survive a motion to dismiss under Fed. R. Civ. P. 12(b) (6). See Hagans, 415 U.S. at 542 n.10.

UNITED STATES SUPREME COURT

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., et al.

No. 93-1307
May 31, 1994

Case below, 4 F.3d 614

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, Plaintiff,	)
v.	)
REIMER & KOGER ASSOCIATES, INC., et al.,	)
Defendants,	)
FRANK MORGAN, et al.,	) No. 92-0922-CV-W-9
Defendants and Third-Party Plaintiffs,	)
v.	)
RESOLUTION TRUST CORPORATION,	)
Third-Party Defendant.	)

ORDER DENYING PLAINTIFF'S SECOND RENEWED MOTION TO REMAND

On February 9, 1993, and June 30, 1994, I denied plaintiff Kansas Public Employees Retirement Systems' (KPERS) Motions toRemand this case to the Shawnee County District Court in Topeka, Kansas. On September 12, 1995, KPERS filed a Second Renewed Motion

to Remand in which it seeks reconsideration of the remand issue and an order remanding this case to the state courts of Kansas. According to KPERS,

> [t]his case remains in federal court only because this [c]ourt determined, on February 9, 1993, and on June 30, 1994, to exercise its discretion to retain these purely state law claims under the protective wing of supplemental federal jurisdiction pursuant to 28 U.S.C. § 1367(c)(3). Over the last year, however, the posture of this case has been altered dramatically. Federal jurisdiction no longer affords the opportunity for expeditious resolution of this controversy. Instead, it will result in delay, deferral and a waste of judicial resources. Therefore, this [c]ourt should not remand this matter to state court.
>
> In the alternative, this [c]ourt should sever the claims against the former officers and directors of Home Savings Association (HSA) and remand all remaining claims to state court.

KPERS' Suggestions in Support (Doc. 676) at 1.

KPERS points primarily to 1) the potential intervention of Boatmen's Bank which would require me to recuse; and 2) the decision of the Eighth Circuit Court of Appeals in KPERS v. Reimer & Koger, 61 F.3d 608 (8th Cir. 1995) as reasons to remand this case that were not considered in the prior Motions to Remand. KPERS urges me to decline to exercise supplemental federal jurisdiction over the state law claims remaining in this case. "At this stage of the litigation, supplemental federal jurisdiction has become an impediment to an expeditious resolution of the case and should therefore be declined. "KPERS' Suggestions in Support (Doc. 676) at 4.

For the reasons stated in the companion opinion issued this same date, this Motion for reconsideration is not authorized by the Federal Rules of Civil Procedure. KPERS has not stated any newly discovered facts or law that would qualify the motion to be considered under Rule 60(b), Federal Rules of Civil Procedure. The decision of the Eighth Circuit Court of Appeals issued on July 27, 1995, is not a newly discovered fact. It may be an unpleasant development from KPERS' viewpoint, but it is not the kind of fact that would support a Rule 60(b) motion.

Since the Eighth Circuit Court of Appeals' decision on July 27, 1995, KPERS has taken a number of steps, including the filing of this motion, to delay the expedi-

tious resolution of this case. Contrary to KPERS' statements that federal jurisdiction has become an impediment to an expeditious resolution of this case, federal jurisdiction promises to bring this lengthy and complex litigation to an end in the foreseeable future. Dispositive motions filed by the defendants are being briefed at this time and will be considered and probably ruled by the end of this year. Ruling on these dispositive motions is an essential and important step in resolving this case at the trial level. Once the motions are ruled, all parties will know what claims, if any, remain for trial. The final preparations for trial can then be scheduled and a new trial date established.

However, even if KPERS had asserted a proper motion to remand, the motion would have been denied. KPERS mistakenly asserts that supplemental jurisdiction is the only basis for this court's jurisdiction over this case. In addition to the proper exercise of supplemental jurisdiction, this court has original jurisdiction over all of the claims asserted in this case. In KPERS v. Reimer & Koger, 61 F.3d 608, 610 (8th Cir. 1995), the court stated with regard to a case removed to federal court by the RTC under the Financial Institutions Reform, Recovery and Enforcement Act: "Under § 144la(l), any suit to which the RTC is a party is 'deemed to arise under the laws of the United States,' and the district courts therefore have original jurisdiction over

such suits. This grant of jurisdiction includes the entire suit, even though the RTC was only a third-party defendant."

Because § 1441(a) (1) provides federal jurisdiction over all the claims contained in this case, there is no need to inquire into supplemental jurisdiction when the federal claims are dismissed. See Spring Garden Associates. L.P. v. RTC, 26 F.3d 412, 417 (3d Cir. 1994); see also California v. Keating, 986 F.2d 346, 348-49 (9th Cir. 1993) (adding the RTC to a case "transforms the entire action into one that 'arises under' the laws of the United States.). Therefore, original jurisdiction exists over the claims remaining after the RTC was dismissed.

On the other hand, if supplemental jurisdiction is required, I continue to believe that the factors of economy, convenience, fairness and comity weigh unmistakably in favor of exercising supplemental jurisdiction over the state law claims. See 28 U.S.C. § 1367(e).

KPERS suggests that my rulings and the decisions of the Eighth Circuit Court of Appeals "have seriously interfered with the ability of the Kansas state government to enforce the KPERS Act." Until KPERS demonstrates that these decisions are wrong under federal or Kansas law, which it has been unsuccessful in doing so far, KPERS' argument makes no sense. Furthermore,

KPERS persists in misunderstanding my analysis of the fairness factor. My concern about fairness focuses on the appearances generated by the obvious benefit to any member of KPERS, including the Kansas judges, who could receive increased benefits if KPERS is successful in this case. Furthermore, as I stated at the July 30, 1994, hearing, the Shawnee County District judge's participation in KPERS' ex parte efforts to thwart the RTC's removal rights "creates a reasonable concern about the manner in which the parties to this case might be treated if [the case is] returned to . . . Shawnee County." Tr. 199. All of the parties in this case deserve a forum for the resolution of their dispute free of these influences.

KPERS' efforts to manipulate the forum for resolving the dispute over its investment in HSA continue. Although this court offers KPERS a forum for the prompt resolution of its claims against the defendants, KPERS recently filed new cases in the Kansas state court asserting the same claims that are pending here. As a result, certain defendants filed motions for injunctive relief against this wasteful, distracting and expensive duplication of efforts. Resolving these motions has caused all parties to devote time and money which could have better been devoted to the summary judgment phase of this case. KPERS' persistent efforts to seek what KPERS believes to be a more friendly forum can

and should be taken into account in deciding whether the balance of factors favors remand. See Carnegie-Mellon University v. Cahill, 108 S. Ct. 614, 622 (1982).

I am firmly persuaded that with the passage of 15 months since the June 30, 1994, ruling, judicial economy deserves greater weight in the balance. Many substantial questions have been resolved during this 15-month period. If this case is remanded to Kansas, KPERS will seek different rulings from the Kansas court on many of the same questions. The wasted resources and delays caused by KPERS repeatedly seeking different rulings on the same issues from the same or different courts must be discouraged.

KPERS also argues that should abstain from exercising federal jurisdiction. However, abstention is the exception, not the rule. Colorado River Water Conservation Dist. v. United States, 96 S. Ct. 1236, 1244 (1976). None of the exceptional circumstances authorizing abstention are present in this case. See Colorado River, 94 S. Ct. at 1244. Contrary to KPERS' argument, no complex state regulatory scheme or state effort to establish a coherent policy with respect to a matter of substantial public concern is involved here. KPERS seeks only to recover money damages on a number of straightforward theories.

For the reasons stated, it is ORDERED that KPERS' Second Renewed Motion to Remand is denied.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
October 25, 1995.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, Plaintiff, v. REIMER & KOGER ASSOCIATES, INC., et al., Defendants, FRANK MORGAN, et al., Defendants and Third-Party Plaintiffs, v. RESOLUTION TRUST CORPORATION, Third-Party Defendant.	No. 92-0922-CV-W-9
KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM Plaintiff, v. BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C., et al., Defendants and Third-Party Plaintiffs,	No. 95-0819-CV-W-9

v.)
)
RESOLUTION TRUST)
CORPORATION,)
)
Third-Party Defendant.)

ORDER GRANTING DEFENDANTS' MOTION FOR FINAL JUDGMENT PURSUANT TO RULE 54 AND GRANTING DEFENDANTS' MOTION FOR PERMANENT INJUNCTION

On June 3, 1996, I issued an order granting summary judgment in favor of Reimer & Koger Associates, Inc. , Kenneth Koger, Ron Reimer, Clifford Shinski, Brent Messick, and Robert Crew (the Reimer & Koger defendants); I.I. Ozar, Sherman Dreiseszun, and the Estate of Frank Morgan (the HSA defendants) Frank Sebree; and Shook, Hardy & Bacon (Shook Hardy) because KPERS' claims asserted against those defendants are barred by the applicable Kansas statute of limitations.

After the June 3, 1996, order was issued, the HSA defendants moved for a final judgment under Rule 54(b), Federal Rules of Civil Procedure.

During a hearing on June 28, 1996, the Reimer & Koger defendants, Shook Hardy and Frank Sebree, joined in the HSA defendants' motion. KPERS' counsel stated that KPERS did not oppose the motion as long as all parties whose summary judgment motions were

decided in the June 3, 1996, order were included in the Rule 54(b) final judgment.

Rule 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

No just reason exists for delay in entering a final judgment pursuant to Rule 54 (b) , in favor of all the defendants in Case No. 92-0922 who prevailed in the June 3, 1996, order. Thus, defendants' Motion for a Final Judgment Under Rule 54(b) will be granted.

Also during the June 28, 1996, hearing, Shook Hardy's counsel requested that as part of the Rule 54(b) final judgment entered in this case the preliminary injunction entered on September 28, 1995, be made permanent. (The preliminary injunction prohibited KPERS from filing, in any other court, claims against the

defendants named in that order arising out of KPERS' investments in Home Savings.) Defendant Frank Sebree joined in the motion. KPERS requested an opportunity to file a written response to the oral motion.

On July 5, 1996, I issued an Order Directing KPERS to Show Cause Why Permanent Injunction Should Not Issue.

By letter dated July 16, 1996, KPERS responded to the Show Cause order. In its letter, KPERS states that it opposes the request that a permanent injunction be entered for all the reasons it objected to the entry of the preliminary injunction. In addition, KPERS asserts that Shook Hardy has not articulated any good cause for a permanent injunction.

After receiving an adverse ruling on the statute of limitations from the Eighth Circuit Court of Appeals, KPERS brought suit in Kansas against Blackwell Sanders Matheny Weary & Lombardi (Blackwell Sanders) and many of the defendants in Case No. 92-0922 asserting the same claims that had been pending for years in this court. Without the injunction I entered on September 28, 1995, I am persuaded that KPERS might again embark on a program of suing the defendants in Case No. 92-0922 and Blackwell Sanders in Kansas asserting the same claims asserted in those cases. For this reason, I restate as if fully set out in this order the findings of facts and

conclusions of law stated on the record at the September 28, 1995, hearing when I granted defendants' motion for preliminary injunctive relief. In order to protect the jurisdiction of this court and to protect the defendants from needless expense and repetitive litigation, defendants' motion that KPERS be permanently enjoined from bringing suit against them in any other court for claims arising out of KPERS' investment in Home Savings will be granted.

Accordingly, it is ORDERED that:

1) because there is no just reason for delay and for the reasons stated in the order dated June 3, 1996, judgment is entered in favor of I.I. Ozar, the Estate of Frank Morgan, Sherman Dreiseszun, Frank Sebree, Reimer & Koger Associates, Inc., Ron Reimer, Ken Koger, Clifford Shinski, Brent Messick, Robert Crew and Shook Hardy and Bacon and against plaintiff on all claims asserted against these defendants in plaintiff's Amended Complaint;

2) defendants' request that the September 28, 1995, preliminary injunction be made permanent is granted;

3) KPERS is permanently enjoined from filing in any other court, claims arising out of KPERS' investments in Home Savings against the following defendants: Shook Hardy and Bacon; Frank Sebree; KPMG Peat Marwick; Robert W. L. Spence; Reimer & Koger

Associates, Inc. ; Ronald Reimer; Kenneth Koger; Robert Crew; Clifford Shinski; Brent Messick; and Blackwell Sanders Matheny Weary & Lombardi; and

4) the $500 bond submitted to the Clerk of the Court by each defendant at the time the preliminary injunction was entered shall be applicable to the permanent injunction.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT COURT

Kansas City, Missouri
July 22, 1996.